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No. 89-954

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

MONTEDORO-WHITNEY CORPORATION,
*Petitioner,*

v.

MARSH-McBIRNEY, INC.,
*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## SUPPLEMENTAL BRIEF OF PETITIONER MONTEDORO-WHITNEY CORPORATION

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Petitioner, Montedoro-Whitney Corporation, submits this Supplemental Brief pursuant to this Court's Rule 15.7.

In the period since the filing of the petition on December 12, 1989, this Court has issued its decision in *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, Docket No. 89-1063, decided January 15, 1991. The ruling in the *FirsTier Mortgage* case is directly applicable to one of the issues raised by the petition in this case. In petitioner's view, *FirsTier Mortgage* mandates that the petition be granted and that the

decision of the Court of Appeals for the Federal Circuit issued August 7, 1989 be summarily reversed.

In particular, in the *FirsTier* case, this Court held that Rule 4(a)(2), Federal Rules of Appellate Procedure, "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment . . . when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." [Emphasis in the original] *FirsTier, slip op.* at 7. In this case, petitioner filed a notice of appeal on March 22, 1988, shortly after the district court announced from the bench a complete decision on liability in this patent infringement case. Under 28 U.S.C. § 1292(c)(2), such a decision, if entered as a judgment, would have been immediately appealable. Compare, *Majorette Toys (U.S.) Inc. v. Darda, Inc. U.S.A.*, 798 F.2d 1390 (Fed.Cir. 1986); *H.A. Jones Co. v. KSM Fastening Sys.*, 745 F.2d 630 (Fed.Cir. 1984); *Saf-Gard Prods. v. Service Parts, Inc.*, 532 F.2d 1266 (9th Cir. 1976) (Kennedy, J.) to *Johannsen v. Payless Drug Stores Inc.*, 918 F.2d 160 (Fed.Cir. 1990); *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132 (Fed.Cir. 1985); *W.L. Gore & Assoc. Inc. v. Carlisle Corp.*, 529 F.2d 614 (3d Cir. 1971).

Section 1292(c)(2), Title 28, United States Code, provides, in pertinent part, that the Federal Circuit shall have exclusive jurisdiction of an appeal from "a judgment in a civil action for patent infringement which would be otherwise appealable . . . and is final except for an accounting." As explained in the petition herein, the district court announced a complete decision on patent liability on March 16, 1988. Thus, if a judgment had been entered immediately thereafter,

that decision would clearly have been appealable. Under *FirsTier*, petitioner's March 22, 1988 notice of appeal was effective.

Since the *FirsTier* decision mandates reversal of the Federal Circuit's judgment in this case, petitioner respectfully requests the Court to enter a summary order to that effect under Rule 16.1.

Respectfully submitted,

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